

1
2
3
4
5
6 UNITED STATES DISTRICT COURT
7 WESTERN DISTRICT OF WASHINGTON
8 AT TACOMA

9 SABRINA MARIE KENDALL,

10 Petitioner,

11 v.

12 JANE PARNELL,

13 Respondent.

CASE NO. 3:15-CV-05308-RBL-DWC

REPORT AND
RECOMMENDATION

Noting Date: September 11, 2015

The District Court has referred this action to United States Magistrate Judge David W. Christel. Petitioner filed her federal habeas Petition (“Petition”), pursuant to 28 U.S.C. § 2254, seeking relief from a state court conviction. The Court concludes the Petition is time-barred and recommends the Petition be dismissed with prejudice.

BACKGROUND

In October of 2004, Petitioner was found guilty of first degree murder. Dkt. 16, Exhibit 1. Petitioner was sentenced to 324 months of imprisonment on November 19, 2004. *Id.* Petitioner challenged her conviction and sentence on direct appeal. Dkt. 16, Exhibit 3. The Court of Appeals of the State of Washington affirmed Petitioner’s conviction, and the Washington State

1 Supreme Court denied review without comment on December 5, 2007. Dkt. 16, Exhibits 6, 8.

2 Petitioner did not file a state collateral attack.

3 On May 5, 2015, Petitioner signed, effectively filing¹, her federal habeas Petition. Dkt. 7,
4 p. 24. Respondent maintains the Petition was signed after the statute of limitations expired, and
5 therefore the Petition is untimely and should be dismissed with prejudice. Dkt. 15. Petitioner did
6 not file a Response to Respondent's Answer.²

7 DISCUSSION

8 Pursuant to the Antiterrorism and Effective Death Penalty Act ("AEDPA"), which became
9 effective on April 24, 1996, and is codified at 28 U.S.C. § 2241 *et seq.*, a one-year statute of
10 limitations applies to federal habeas petitions. Section 2244(d)(1)(A) requires a prisoner to file a
11 habeas petition within one year of "the date on which the [state court] judgment [of conviction]
12 became final by the conclusion of direct review or the expiration of the time for seeking such
13 review". A direct review generally concludes and the judgment becomes final either upon the
14 expiration of the time for filing a petition for writ of certiorari with the United States Supreme
15 Court, or when the Supreme Court rules on a timely filed petition for certiorari. *Bowen v. Roe*,
16 188 F.3d 1157, 1158-59 (9th Cir. 1999). The Act further states "[t]he time during which a
17 properly filed application for state post-conviction or other collateral review . . . is pending shall
18 not be counted toward any period of limitation under this subsection." 28 U.S.C. § 2244(d)(2).

19 Petitioner filed a direct appeal challenging her conviction and sentence. Dkt. 16, Exhibit 3.
20 The Washington State Supreme Court denied review on December 5, 2007. Dkt. 15, Exhibit 8.

21 ¹ Under the prison "mailbox rule," a petition is deemed filed for purposes of AEPDA's statute of
22 limitations the moment it is delivered to prison authorities for forwarding to the clerk of the district court.
23 *See Patterson v. Stewart*, 251 F.3d 1243, 1245 n. 2 (9th Cir. 2001).

24 ² Petitioner has not requested an evidentiary hearing, and the Court concludes an evidentiary
hearing is not necessary in this case. *See* 28 U.S.C. §2254(e)(2) (1996).

1 Petitioner did not file a petition for writ of certiorari in the United States Supreme Court (*see*
 2 Dkt. 7, p. 3), making her direct appeal final on March 4, 2008, the date the time for filing a
 3 petition for certiorari expired. *See* U.S. Sup. Ct. Rule 13 (a writ of certiorari must be filed within
 4 90 days after entry of the judgment).

5 The AEDPA limitations period began running on March 5, 2008, the day after the direct
 6 appeal became final. Petitioner did not file a state collateral attack. Therefore, the statute of
 7 limitations expired on March 5, 2009, one year after Petitioner's state conviction became final.
 8 Petitioner did not file her Petition until May 5, 2015, which was six years and two months after
 9 the statute of limitations expired.

10 The AEDPA statute of limitations is subject to equitable tolling where the petitioner
 11 pursued her rights diligently and "some extraordinary circumstance stood in h[er] way." *Holland*
 12 *v. Florida*, 560 U.S. 631, 649 (2010) (internal quotations omitted). To receive equitable tolling, a
 13 petitioner at the very least must show the extraordinary circumstances "were the but-for and
 14 proximate cause of h[er] untimeliness." *Ansaldo v. Knowles*, 143 Fed. Appx. 839, 840 (9th Cir.
 15 2005). In her Petition, when asked why the state of limitations does not bar her Petition,
 16 Petitioner stated "DOES NOT APPLY." Dkt. 7, p. 22. Petitioner fails to demonstrate any
 17 extraordinary circumstance prevented her from filing a timely habeas petition. Further, Petitioner
 18 fails to explain why she waited approximately seven years after her state conviction became final
 19 before pursuing post-conviction relief. Accordingly, Petitioner fails to show she is entitled to
 20 equitable tolling and the Petition is barred by the statute of limitations.³

21
 22
 23 ³ Respondent also asserts the Petition should be denied because Petitioner failed to exhaust the
 24 available state remedies for Grounds 2, 3, and 4 and is now procedurally barred from bringing those
 claims in federal court. Dkt. 15. As the Court finds the Petition is time-barred, the Court declines to
 discuss Respondent's additional arguments.

1 CERTIFICATE OF APPEALABILITY

2 A petitioner seeking post-conviction relief under 28 U.S.C. § 2254 may appeal a district
 3 court's dismissal of the federal habeas petition only after obtaining a certificate of appealability
 4 (COA) from a district or circuit judge. *See* 28 U.S.C. § 2253(c). "A certificate of appealability
 5 may issue . . . only if the [petitioner] has made a substantial showing of the denial of a
 6 constitutional right." 28 U.S.C. § 2253(c)(2). Petitioner satisfies this standard "by demonstrating
 7 that jurists of reason could disagree with the district court's resolution of h[er] constitutional
 8 claims or that jurists could conclude the issues presented are adequate to deserve encouragement
 9 to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003) (*citing Slack v. McDaniel*,
 10 529 U.S. 473, 484 (2000)). Pursuant to this standard, this Court concludes Petitioner is not
 11 entitled to a certificate of appealability with respect to this Petition.

12 CONCLUSION

13 Petitioner's Petition is untimely as it was filed more than one year after the state court
 14 judgment became final. There are no extraordinary circumstances in this case requiring the
 15 application of equitable tolling principles. Therefore, the Petition is barred by the one-year
 16 statute of limitations period imposed under 28 U.S.C. § 2244(d) and should be dismissed with
 17 prejudice. No evidentiary hearing is necessary and a certificate of appealability should be denied.

18 Pursuant to 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b), the parties shall have
 19 fourteen (14) days from service of this Report to file written objections. *See also* Fed. R. Civ. P.
 20 6. Failure to file objections will result in a waiver of those objections for purposes of de novo
 21 review by the district judge. *See* 28 U.S.C. § 636(b)(1)(C). Accommodating the time limit
 22 imposed by Fed. R. Civ. P. 72(b), the clerk is directed to set the matter for consideration on
 23 September 11, 2015, as noted in the caption.

1 Dated this 18th day of August, 2015.

2
3
4



5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24

David W. Christel
United States Magistrate Judge